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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
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Delegations will find attached document SWD(2024) 32 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on combating the sexual abuse and sexual exploitation of children and child sexual abuse material, and replacing Council Framework Decision 2004/68/JHA (recast)

{COM(2024) 60 final} - {SEC(2024) 57 final} - {SWD(2024) 33 final} -
{SWD(2024) 34 final}

Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
Art. 83(1) TFEU, which allows the EU to adopt minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension, including on sexual exploitation of children.
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
In the case of the prevention and combating of child sexual abuse and exploitation, the Union's competence is shared. The EU can adopt rules to ensure minimum harmonisation, but Member States can go above and beyond and adopt further measures. In the area of prevention, the Union has a competence to promote and support Member States' actions.
*Subsidiarity does not apply for policy areas where the Union has **exclusive** competence as defined in Article 3 TFEU[1]. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU[2] sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU[3] sets out the areas for which the Unions has competence only to support the actions of the Member States.*
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2[4]: - Has there been a wide consultation before proposing the act? - Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
The Commission consulted widely before proposing the act; the public consultation is detailed in Annex 2 of the Impact Assessment (IA). Consultation included an internet-based public consultation in all 24 official EU languages, as well as online surveys, targeted interviews, virtual study visit interviews, an online questionnaire focused on the costs of identified policy options, case study interviews focused on the costs/impacts of identified policy options, and workshops. The consultation efforts included all stakeholders identified as relevant, including Member States' governments, EU bodies and agencies, civil society and private sector stakeholders (please see also the table in Annex 2 of the IA). The Explanatory Memorandum to the Proposal and Chapter 3 of the IA each contain a section on the principle of subsidiarity; please also see the response to question 2.2 below.
2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?
Yes. The proposal and the IA outline that the cross-border nature of child sexual abuse and

[1] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN
[2] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN
[3] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML
[4] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN

exploitation offenses, which already justified the adoption of the original Directive, has become even more prominent in the latest decade, with the increased prevalence in the use of online technologies that enable, facilitate and amplify the impact of such offenses. To allow for effective prosecution of offenders and victims' protection everywhere in the Union, common minimum standards on the definition of offenses and levels of sanctions are needed, and that can only be achieved by Union action. Analogously, because of phenomena such as travelling sex offenders and online abuse, Member States would not be able to effectively (i) prevent the commission of child sexual abuse offenses in their territory, (ii) investigate and prosecute child sexual abuse crimes with a cross-border dimensions, and (iii) identify and adequately provide assistance to victims, in the absence of common rules. Hence, the proposal fully respects the principle of subsidiarity as set out in Article 5(3) of the Treaty on European Union.

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

The objectives of the proposed action cannot be achieved sufficiently by the Member States acting alone, as the problem is pervasive across the EU and has an inherent cross-border component, especially when it comes to its online dimension, that cannot be tackled by Member States individually.

(a) Are there significant/appreciable transnational/cross-border aspects to the problems being tackled? Have these been quantified?

While child sexual abuse still mostly takes place within the immediate environment of the child and is perpetrated by individuals from within the circle of trust of the child, phenomena such as travelling child sex offenders, who cross borders to regain contact with children, as well as the spreading of online child sexual abuse material, have been growing for decades. In addition, online solicitation and live distant sexual abuse of children has increased significantly during the COVID 19 pandemic. These phenomena are inherently cross-border in nature, with networks of offenders often spanning many countries. A quantification of the sharing of child sexual abuse materials online is provided, e.g., by the reports from the National Center for Missing and Exploited Children[5] which have been used for the purposes of the IA and which show that persons in all EU Member States upload child sexual abuse materials for dissemination, totalling several million images and videos per year.

(b) Would national action or the absence of the EU level action conflict with core objectives of the Treaty[6] or significantly damage the interests of other Member States?

In the absence of EU action, Member States would have to keep adopting individual national laws to respond to current and emerging challenges, with the consequence of fragmentation and diverging laws likely to negatively affect the effective fight against child sexual abuse.

(c) To what extent do Member States have the ability or possibility to enact appropriate measures?

Member States remain competent to enact measures to prevent and combat child sexual abuse at national level, to the extent that those do not contradict or otherwise negatively impact the harmonised area of law. However, the divergence between different national measures, especially when it comes to criminalisation of offences, creates challenges for cross-border cooperation, which is of particular importance especially in relation to the online dimension of the crime and to travelling child sex offenders.

[5] Available at https://www.missingkids.org/ourwork/impact#reduceexploitation.
[6] https://europa.eu/european-union/about-eu/eu-in-brief_en

(d) How does the problem and its causes (e.g. negative externalities, spill-over effects) vary across the national, regional and local levels of the EU?
The problem affects more or less all Member States of the EU. There is some variance when it comes to hosting of child sexual abuse materials online, where there is a greater prevalence of materials detected in certain Member States that have a particularly well-developed digital infrastructure, such as the Netherlands.
(e) Is the problem widespread across the EU or limited to a few Member States?
The problem is widespread across the EU.
(f) Are Member States overstretched in achieving the objectives of the planned measure?
No, Member States do not appear to be overstretched. Rather, this has been recognised as a shared priority.
(g) How do the views/preferred courses of action of national, regional and local authorities differ across the EU?
There were no significant differences in the preferences of national, regional and local authorities expressed during the consultation. While individual approaches especially in the area of prevention diverge, there is an overall shared objective.
2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?
While there are no significant economies of scale in criminal law harmonisation, there is still a clear added value in terms of a more effective application of the legal framework across the Union and, more importantly, more effective prevention, investigation and prosecution of child sexual abuse cases and support for victims.
(a) Are there clear benefits from EU level action?
Yes. The evaluation of the existing EU framework which this proposal aims to update has already shown the benefits of coordinated EU action in this area, while identifying a number of gaps that the present proposal seeks to address. Given the ever-greater importance of the online component of the crimes, which is often cross-border in nature, EU-level action can help provide a harmonised approach to criminalisation and investigation of child sexual abuse that cannot be provided by Member States acting individually.
(b) Are there economies of scale? Can the objectives be met more efficiently at EU level (larger benefits per unit cost)? Will the functioning of the internal market be improved?
There are no significant economies of scale as the area of criminal law requires each individual Member State to invest its resources; however, some economies may result from more efficient investigations based on harmonised criminal law frameworks and from a more coordinated approach to prevention measures, where Member States may build on successful initiatives developed in other Member States.
(c) What are the benefits in replacing different national policies and rules with a more homogenous policy approach?
The benefits lie mostly in a more coherent and consistent approach to a significant public health and

societal challenge across the EU Member States, and in more efficient and effective prevention, investigation and prosecution of child sexual abuse crimes and improved victim support.

(d) Do the benefits of EU-level action outweigh the loss of competence of the Member States and the local and regional authorities (beyond the costs and benefits of acting at national, regional and local levels)?

Yes. The current proposal is a recast and does not further reduce the competence of Member States compared to the existing situation; rather, it sharpens and redefines obligations to ensure that the instrument is fit for the digital age and for challenges that have emerged more recently.

(e) Will there be improved legal clarity for those having to implement the legislation?

Yes, the framework for specific types of crimes committed mostly online should be clarified compared to the existing situation.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the Commission's proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

The explanatory memorandum and impact assessment set out a justification that should allow an appraisal of the compliance of the proposal with the principle of proportionality. In summary, the proposed changes to the Directive are limited and targeted to address the key shortcomings identified in the evaluation of the Directive and to cover only those aspects that Member States cannot achieve satisfactorily on their own. In particular, the necessary adaptations of the definitions of offenses can only achieve their objective of ensuring that inherently cross-border child sexual abuse and exploitation offenses can be effectively tackled if adopted at EU level.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed action is considered an appropriate way to achieve the intended objecties, as it is strictly limited to areas where Union action is needed, should occasion only limited costs that are proportionate in view of the objective to be achieved, and leaves room to accommodate national specificities.

(a) Is the initiative limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?

The initiative is limited to a targeted change in definitions on crimes committed mostly online, which are inherently cross-border in nature and therefore require a coordinated approach that Member States cannot achieve by acting individually. It also includes measures to strengthen victims' rights and prevention which are strictly limited to those areas where the Union is better placed to act.

(b) Is the form of Union action (choice of instrument) justified, as simple as possible, and coherent with the satisfactory achievement of, and ensuring compliance with the objectives pursued (e.g. choice between regulation, (framework) directive, recommendation, or alternative regulatory methods such as co-legislation, etc.)?

The instrument of choice is defined in Art. 82(1) TFEU, and that rule has been respected (Directive).

(c) Does the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set? (e.g. is it possible to limit the European action to minimum standards or use a less stringent policy instrument og approach?)
The Union action leaves as much room as possible for Member State action, e.g. when it comes to criminalising further action, as it restricts itself to minimum harmonisation in line with its legal base, Art. 82(1) TFEU. In addition, in the area of prevention, the Union can only take supporting action, allowing Member States to build on the harmonised framework with measures of their own choosing.
(d) Does the initiative create financial or administrative cost for the Union, national governments, regional or local authorities, economic operators or citizens? Are these costs commensurate with the objective to be achieved?
The initiative creates limited costs for national administrations in necessitating a change of legislation. It may also occasion specific additional costs for national coordinating authorities on child sexual abuse, where those do not yet exist. These costs are considered commensurate with the important objective to be achieved, which is a more effective prevention, investigation and prosecution of child sexual abuse.
(e) While respecting the Union law, have special circumstances applying in individual Member States been taken into account?
While there were no specific special national circumstances taken into account in preparing this proposal, the form of the instrument, as a directive, the minimum harmonisation approach and, where applicable, the supporting action allows Member States to accommodate any special circumstances that may result from the national context.